MIDF Amanah Investment Bank Bhd (fomerly known as Amanah Short Deposit Bhd) v Pesaka Astana (M) Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D2–22–1085 OF 2006
HARMINDAR SINGH DHALIWAL J
25 OCTOBER 2015

Companies and Corporations — Separate legal entity — Lifting veil of incorporation — Owners cum controllers of company could not explain how trust monies received by company were siphoned away — Whether owners/controllers could not hide behind corporate veil — Whether they should be personally liable for losses sustained — Whether trustee appointed under financing scheme not liable for loss of trust monies as monies were not paid into designated accounts controlled by trustee but into private accounts

The plaintiff commenced the instant action against the defendants when it was unable to recover RM13m payable to it under two medium term notes ('notes') issued to it by the first defendant ('Pesaka') as security for loans. The plaintiff entered summary judgment against Pesaka, withdrew its claim against the second defendant ('KAF') and proceeded with its claim against the third defendant ('MTB'), which was the security trustee under the notes programme, and the fourth and fifth defendants ('Rafie' and 'Murnira') who jointly owned 90% of Pesaka. Under the notes programme, MTB was the sole signatory and operator of three designated accounts. By two deeds of assignment between Pesaka and MTB, monies payable by the Ministry of Defence ('MINDEF') to Pesaka under two contracts that had a total value of RM16.4m, were assigned to be receivable by MTB. However, the bulk of the monies under the two contracts were not paid by MINDEF into the designated accounts but into accounts operated and controlled solely by Pesaka from where the monies 'disappeared'. The plaintiff contended that MTB was negligent in causing the loss of the monies whilst Rafie and Murnira, as the directing mind and will and alter ego of Pesaka, dishonestly caused the monies to be siphoned away.

Held, dismissing the claim against MTB but allowing the claim against Rafie and Murnira and ordering them to pay whatever sums were due to discharge Pesaka's indebtedness to the plaintiff:

(1) The plaintiff failed to prove that MTB had a duty to account for any proceeds deposited in any accounts other than the proceeds account. MTB was not accountable for monies that were deposited into Pesaka's

other accounts unknown to MTB. The proximate cause of the loss of the amount which the plaintiff was claiming had to be Pesaka – which received the full proceeds of the first assigned contract in its operating account and continued to receive monies in respect of the second assigned contract and later siphoned it off – and MINDEF for failing to comply with the notice of assignment of the second assigned contract, instructing that all payments should be made into the proceeds account (see paras 39 & 52–53).

(2) MTB could not be held responsible for checking on the performance of the assigned contracts, the quality of work done by the issuer or to ensure payments were made by MINDEF. This went beyond the scope of a trustee in a financing scheme. The duty of the trustee in the present case was to ensure that monies deposited into the proceeds account (which was one of the designated accounts) were secured for the benefit of the noteholder. This duty was fulfilled by MTB when it became the sole signatory of the designated accounts (see paras 54–55).

(3) Rafie and Murnira could not be allowed to hide behind the corporate veil of Pesaka. Together, they owned 90% of Pesaka and were its directing will and mind and the ultimate beneficiaries of monies coming into the company. They failed to explain what had happened to the monies received by Pesaka and it was only fair to assume that only they could have benefitted from the monies. Rafie and Murnira had dishonestly used Pesaka as a conduit to siphon off monies that did not belong to them. There was ample justification to pierce the corporate veil and to hold them liable for the losses sustained by the plaintiff (see paras 56, 60 & 64–63).

(4) With regard to the first assigned contract, it was plain that there was an element of dishonesty and unconscionable conduct when Note 2/2005 was issued when it was known that the first assigned contract had already been performed by MINDEF and there would not be any future contract proceeds payable to Pesaka. MINDEF paid the RM7.3m proceeds into Pesaka's operating account from where the monies disappeared. The only probable conclusion was that Pesaka must have instructed MINDEF to transfer the money into the operating account instead of the proceeds account and only Rafie and Murnira could have allowed this to happen. With regard to the second assigned contract, although Rafie and Murnira knew that the contract proceeds had been assigned to MTB and the proceeds should be rightly paid into the designated accounts, they caused Pesaka to direct MINDEF to pay the proceeds into a non-designated account controlled by Pesaka. The contract proceeds were trust monies and Pesaka had no business in dealing with those monies (see paras 57–58 & 62).

[Bahasa Malaysia summary

Plaintif memulakan tindakan segera terhadap defendan apabila ia tidak boleh mendapatkan semula RM13 juta yang perlu dibayar kepadanya di bawah dua nota terma sederhana ('nota') yang dikeluarkan kepadanya oleh defendan pertama ('Pesaka') sebagai cagaran untuk pinjaman. Plaintif memasukkan penghakiman terus terhadap Pesaka, menarik balik tuntutannya terhadap defendan kedua ('KAF') dan meneruskan tuntutan terhadap defendan ketiga ('MTB'), yang merupakan pemegang amanah sekuriti di bawah program nota dan defendan yang keempat dan kelima ('Rafie' dan 'Murnira') yang memiliki bersama 90% daripada Pesaka. Di bawah program nota, MTB merupakan penandatangan tunggal dan pengendali tiga akaun yang ditetapkan. Melalui dua surat ikatan tugasan antara Pesaka dan MTB, wang yang perlu dibayar oleh Kementerian Pertahanan ('MINDEF') kepada Pesaka di bawah dua kontrak yang mempunyai jumlah nilai sebanyak RM16.4 juta, telah ditetapkan untuk diterima oleh MTB. Walau bagaimanapun, sebahagian besar daripada wang di bawah kedua-dua kontrak tidak dibayar oleh MINDEF ke dalam akaun yang ditetapkan tetapi ke dalam akaun yang dikendalikan dan dikawal sepenuhnya oleh Pesaka di mana wang tersebut 'hilang'. Plaintif menegaskan bahawa MTB cuai dan menyebabkan kehilangan wang manakala Rafie dan Murnira, sebagai minda pengarah dan *alter ego* Pesaka, secara tidak jujur menyebabkan wang tersebut dilarikan.

Diputuskan, menolak tuntutan terhadap MTB tetapi membenarkan tuntutan terhadap Rafie dan Murnira dan mengarahkan mereka untuk membayar mana-mana jumlah yang terhutang untuk melepaskan keberhutangan Pesaka kepada plaintif:

(1) Plaintif gagal membuktikan bahawa MTB mempunyai tanggungjawab untuk mengambilkira mana-mana hasil yang disimpan dalam mana-mana akaun selain daripada akaun hasil. MTB tidak bertanggungjawab terhadap wang yang didepositkan ke dalam akaun Pesaka yang lain yang tidak diketahui oleh MTB. Punca terdekat kehilangan jumlah yang dituntut plaintif adalah disebabkan Pesaka – yang menerima hasil penuh kontrak serah hak pertama dalam akaun operasinya dan terus menerima wang berhubung kontrak serah hak kedua dan kemudiannya melarikannya – dan MINDEF kerana gagal mematuhi notis penyerahhakan kontrak serah hak kedua, mengarahkan bahawa semua bayaran hendaklah dibuat ke dalam akaun hasil (lihat perenggan 39 & 52–53).

(2) MTB tidak boleh dijadikan bertanggungjawab untuk menyemak prestasi kontrak serah hak, kualiti kerja yang dilakukan oleh penerbit atau untuk memastikan bayaran dibuat oleh MINDEF. Ini melangkaui skop pemegang amanah dalam skim pembiayaan. Kewajipan pemegang amanah di dalam kes ini adalah untuk memastikan bahawa wang yang

didepositkan ke dalam akaun hasil (yang merupakan salah satu akaun yang ditetapkan) dijamin untuk kebaikan pemegang nota. Tugas ini telah dipenuhi oleh MTB apabila MTB menjadi penandatangan tunggal akaun yang ditetapkan (lihat perenggan 54–55).

(3) Rafie dan Murnira tidak boleh dibenarkan untuk bersembunyi di sebalik tabir korporat Pesaka. Bersama-sama, mereka memiliki 90% daripada Pesaka dan merupakan minda dan semangat pengarah dan benefisiari penting kepada wang yang masuk ke dalam syarikat tersebut. Mereka gagal untuk menjelaskan apa yang telah berlaku kepada wang yang diterima oleh Pesaka dan adalah adil untuk menganggap bahawa hanya mereka boleh mendapat manfaat daripada wang tersebut. Rafie dan Murnira telah menyalahgunakan Pesaka sebagai saluran untuk melarikan wang yang bukan milik mereka. Terdapat justifikasi yang mencukupi untuk menyingkap tabir korporat dan menjadikan mereka bertanggungjawab ke atas kerugian yang dialami oleh plaintif (lihat perenggan 56, 60 & 64–63).

(4) Berhubung dengan kontrak serah hak pertama, adalah jelas bahawa terdapat unsur ketidakjujuran dan kelakuan tidak berhati perut apabila Nota 2/2005 telah dikeluarkan apabila diketahui bahawa kontrak serah hak pertama telah pun dilaksanakan oleh MINDEF dan tidak akan ada sebarang hasil kontrak masa depan yang perlu dibayar kepada Pesaka. MINDEF membayar RM7.3 juta hasil ke dalam akaun operasi Pesaka di mana wang tersebut telah hilang. Satu-satunya kesimpulan yang berkemungkinan adalah bahawa Pesaka mesti telah mengarahkan MINDEF untuk memindahkan wang ke dalam akaun operasi daripada akaun hasil dan hanya Rafie dan Murnira yang boleh membenarkan ini berlaku. Berhubung dengan kontrak serah hak kedua, walaupun Rafie dan Murnira tahu bahawa hasil kontrak telah ditetapkan untuk MTB dan hasil tersebut seharusnya dibayar ke dalam akaun yang ditetapkan, mereka menyebabkan Pesaka mengarahkan MINDEF untuk membayar hasil ke dalam akaun yang tidak ditetapkan yang dikawal oleh Pesaka. Hasil kontrak merupakan wang amanah dan Pesaka tidak berhak untuk berurusan dengan wang tersebut (lihat perenggan 57–58 & 62).]

Notes

For cases on lifting veil of incorporation, see 3(1) *Mallal's Digest* (5th Ed, 2015) paras 992–1024.

Cases referred to

Anjalai Ammal & Anor v Abdul Kareem [1969] 1 MLJ 22, FC (refd)

CIMB Bank Bhd v Maybank Trustees Bhd and other appeals [2014] 3 MLJ 169, FC (distd)

Chua Seng Sam Realty Sdn Bhd v Say Chong Sdn Bhd & Ors and other appeals [2013] 2 MLJ 29, CA (refd)

Dr Abdul Hamid Abdul Rashid & Anor v Jurusan Malaysia Consultants (sued as a firm) & Ors [1997] 3 MLJ 546, HC (refd)
Royal Brunei Airlines v Tan [1995] 3 All ER 97, PC (refd)
Wu Siew Ying t/a Fuh Lin Bud-Grafting Centre v Gunung Tunggal Quarry & Construction Sdn Bhd & Anor [2011] 2 MLJ 1, FC (refd)

Legislation referred to

Capital Markets and Services Act 2007
Securities Commission Act 1993 ss 2, 72, 73, 74, 75, 76, 77, 78, 79, 82, Part IV, Division 4
Trustees Act 1949

Chin Tzi Song (Arifin & Partners) for the plaintiff.
Robert Lazar (Mark Lau and Aaarti Jeyarajah with him) (Sreenevasan Young) for the third defendant.
Lim Kon Keen (Seow & Megat) for the fourth and fifth defendants.

Harmindar Singh Dhaliwal J:

INTRODUCTION

[1] The plaintiff's claim against the defendants in this action is in respect to the default in the matter of notes issued in the commercial paper/medium term notes programme ('CP/MTN') for the aggregate sum of RM13m. Summary judgment had been entered against the first defendant ('Pesaka') on 3 December 2009 and the company has since been wound-up on 22 March 2013. The claim against the second defendant ('KAF') was withdrawn by the plaintiff on 12 November 2014. So only the claim against the third defendant ('MTB'), the fourth defendant ('Rafie') and the fifth defendant ('Murnira') remains.

[2] The background to this action can be stated as follows. In 2004, Pesaka embarked on an ambitious financing exercise by the issuance of private debt securities. Essentially it shifted the focus of its borrowings from the conventional banking lines (although it still retained some measure of the same) into the more esoteric world of Islamic bonds, commercial papers and medium term notes ('papers'). These are all different forms of borrowing whereby promissory notes are issued. The main feature for the lender is that the papers are transferable, and that there might well be a secondary market for the buying and selling of these papers.

[3] The financing scheme in this instance involved the raising of RM140m by way of Islamic bonds (*Al-Bai Bithaman Ajil Bonds* ('ABBA Bonds') and RM200m in the commercial papers and medium term notes programme ('CP/MTN programme'). Ultimately, the ABBA Bonds were issued in full

whilst only RM14m worth of commercial papers were issued. The commercial papers ('CP') had a term less than six months whilst the medium term notes ('MTN') were for a period of 12–84 months. They were therefore intended to be short term borrowings.

[4] In consideration of the lending, Pesaka as the issuer issued the CPs in question (although they carried 'note numbers'). The lenders then end up holding the notes which represents the promise by the Issuer to pay the face value. In essence, the notes are issued at a discount and the difference between the subscription price (the lending) and the face value of the note (the repayment amount) represents interest or profit to the lender/noteholder.

[5] In the instant case however, there was a default in payment to both the ABBA bondholders and to the noteholder of the CP/MTN programme. In relation to the default in the repayments of the ABBA Bonds, the bondholders had on 14 December 2005 filed a suit against the same defendants as in the present suit ('*Pesaka No 1*'). The present proceedings were then ordered to be stayed pending the decision of *Pesaka No 1*. The Federal Court delivered its final decision on 10 February 2014, and thereafter the present proceedings had recommenced.

[6] The trial of this matter had initially commenced in 2011 and there had been several days of trial wherein the plaintiff's witnesses had given testimony. After the Federal Court's decision, the instant trial was however directed to be heard *de novo* as the parties no longer disputed the documents adduced at the earlier trial. After disposal of some interlocutory applications, the trial subsequently commenced on 15 June 2015 and concluded before the end of the next day.

RELEVANT FACTS

[7] By the Securities Commission's ('SC') letter dated 28 January 2004 to KAF, SC had approved Pesaka's financing scheme for the aggregate sum of RM365m comprising of RM140m worth of *Al-Bai Bithaman Ajil* Bonds ('ABBA Bonds') for the financing of 'Existing Contracts', RM200m worth of secured promissory notes consisting of commercial papers and/or medium term notes for the part financing of 'Future Contracts' and banking facilities of RM25m with the Bumiputra-Commerce Bank Bhd ('BCB Banking Facilities') – collectively referred to as the 'Financing Scheme'. Pursuant thereto, Pesaka issued the information memorandum dated 15 March 2004 for the financing scheme ('Information Memorandum' (IM)).

[8] It is common ground that:

(a) KAF was appointed as the lead arranger/manager, facility agent, issuing

agent, paying agent and authorised depository and as the underwriter;

(b) MTB was appointed as the trustee and security trustee under the financing scheme; and

(c) KAF invited the plaintiff and the plaintiff is a member in the tender panel member to bid for and purchase the notes issued under the notes programme.

[9] Pursuant to the information memorandum, various agreements were executed in respect of the notes programme, inter alia:

(a) the notes issuance facility agreement dated 14 July 2004 ('notes agreement') between Pesaka and KAF in the capacity as lead arranger/manager, as facility agent, as issuing agent, paying agent and authorised depository and as underwriter, and the underwriters of the notes;

(b) the tender panel member agreement (tender panel agreement) dated 14 July 2004 between KAF and the plaintiff;

(c) the trust deed between Pesaka and MTB dated 14 July 2004 ('the trust deed');

(d) the deed of assignment of assigned contract between Pesaka and MTB dated 14 July 2004 ('first deed of assignment') in respect of contract known as the letter of award dated 13 March 2004 from Kementerian Pertahanan Malaysia ('MINDEF') or referred to as KP/PERO-1/C/REODV/01/2004/OE(8) with a contract value of RM7,374,703.32 ('first assigned contract');

(e) the deed of assignment of assigned contract between the Pesaka and MTB dated 27 May 2005 ('second deed of assignment') in respect of the contract known as the letter of acceptance dated 19 April 2005 from Kementerian Pertahanan Malaysia ('MINDEF') Contract No KP/PERO-1/ALGK-AMDAC/A/12/2004/OE with a contract value of RM9m ('second assigned contract'); and

(f) the power of attorney between Pesaka and MTB dated 14 July 2004 ('PA').

[10] Under the notes programme, Pesaka is the sole signatory and operator for the operating account (account No 1230–0003129–05–3) and MTB is the sole signatory and operator for the following three designated accounts:

(a) debt service reserve account (account No 1408–1200560–05–9);

(b) disbursement account (account No 1480–1200561–05–1); and

(c) proceeds account (account No 1408–1200562–05–4) on 1 July 2004.

[11] The accounts were opened and activated on 1 July 2004. A

[12] It is also common ground that Pesaka had issued the following notes:

(a) on 28 July 2004 issued Note 1/2004 face amount RM1m to mature on 27 August 2004; B

(b) on 27 January 2005 issued Note 2/2005 face amount RM6m to mature on 26 July 2005 and the plaintiff is the noteholder of the same;

(c) on 9 June 2005 issued Note 3/2005 face amount RM7m to mature on 9 December 2005 and the plaintiff is the noteholder of the same; and C

(d) on 26 July 2005 issued Note 4/2005 face amount RM6m to mature on 20 January 2006 and the plaintiff is the holder of the same.

[13] Note 1/2004 was redeemed by Pesaka on 27 August 2004 and Note 2/2005 was rolled over to Note 4/2005. Hence, Note 3/2005 and Note 4/2005 remain outstanding. D

[14] By Pesaka's letters dated 14 July 2004 to MINDEF, Pesaka had notified MINDEF that all amounts payable to Pesaka under the first assigned contract had been assigned to MTB ('notice of first deed of assignment'). E

[15] By Pesaka's letter of 31 May 2005 to MINDEF, Pesaka notified MINDEF that all amounts payable to Pesaka under the second assigned contract had been assigned to MTB and that the proceeds are to be paid into the proceeds account ('notice of second deed of assignment'). F

[16] Both the notices of first and second deed of assignments were duly acknowledged by MINDEF and MTB. G

[17] The plaintiff received a letter dated 30 September 2005 from MTB informing that MTB had declared an event of default for the ABBA Bonds and MTB was calling a meeting for the ABBA bondholders on 4 October 2005. At this meeting, the plaintiff was fully apprised of the issues in relation to the ABBA bonds. H

[18] Subsequently, on 12 October 2005 KAF gave notice to Pesaka that the majority of the underwriters of the CP/MTN programme were invoking the cross-default clause and consequently cancelling the CP/MTN programme, due to the ABBA bonds event of default. MTB notified the plaintiff the same day and enclosed a copy of KAF's letter dated 12 October 2005 to Pesaka. I

[19] By the plaintiff's letter dated 28 October 2005 to MTB, the plaintiff requested MTB to declare an event of default under the notes programme and by MTB's letter dated 7 November 2005 to Pesaka, an event of default was declared by MTB under the trust deed and therefore the Note 3/2005 and Note 4/2005 became immediately due and payable.

ISSUES

[20] The crux of the plaintiff's complaints against MTB, and which now form the issues to be decided by the court, are:

(a) in respect of the first assigned contract, that MTB had been negligent in failing to ensure the correct designated accounts number and details were given by Pesaka to MINDEF and to rectify the said defective notice and as a consequence thereof, MINDEF had paid the contract proceeds into a non-designated account and the contract proceeds had slipped away; and

(b) in respect of the second assigned contract, that MTB had been negligent in failing to follow up closely with MINDEF as to the status of the second assigned contract and it emerged that second assigned contract was extended by Pesaka. As a consequence thereof, the contracts proceeds were not paid into the designated account and similarly slipped away.

[21] The crux of the plaintiff's complaints against Rafie and Murnina in the instant case, and which also form the issues for decision by the court, are (with Rafie and Murnina being in control of Pesaka as the directing mind and will and alter ego of Pesaka):

(a) in respect of the first assigned contract, that Rafie and Murnina had dishonestly failed and/or refused to give proper notice of assignment to MINDEF to ensure the contract proceeds are paid into the proper designated account and to transfer the contract proceeds into the proper designated accounts and/or to MTB; and

(b) in respect of the second assigned contract, that Rafie and Murnina had dishonestly failed and/or refused to inform KAF, MTB or the plaintiff that the said contract had been extended and to give proper notice of assignment of the extended contract to MINDEF to ensure the contract proceeds therein are paid into the proper designated account.

[22] the present claims by the plaintiff can be divided in each case into two distinct areas as follows:

(a) the claim is relation to note No 2/2005 which was rolled over to the note No 4/2005 for the face value of RM6m; and

(b) the claims in relation to note No 3/2005 for the face value of RM7m.

[23] For convenience as well, the issues alluded to earlier can be considered separately in relation to the plaintiff's claim against MTB and the plaintiff's claim against Rafie and Murnira.

CLAIM AGAINST MAYBAN TRUSTEES BHD (MTB)

[24] In this case, as set out earlier, there were two contracts that came to be assigned to MTB as the security trustee. The first assigned contract was for the supply and delivery of remote explosive ordinance vehicles (REODV) and other items. The value of contract was RM7,374,703.32. This contract was assigned to MTB by a deed of assignment dated 14 July 2004. Notice of assignment was given to MINDEF on the same day.

[25] The second assigned contract was for the supply and delivery of AMDAC vehicle spare parts. It had an estimated contract value of RM9m. This contract was subject to the deed of assignment dated 27 May 2005. Notice of assignment was given to MINDEF on 31 May 2005.

First assigned contract

[26] It is not disputed that Note 1/2004 for sum of RM1m was issued on 28 July 2004 and redeemed on 27 August 2004. It is common ground that nothing turns on this note.

[27] Note 2/2005 for RM6m was issued on 27 January 2005 and was to mature on 26 July 2005.However, proceeds of the first assigned contract had been paid in full by MINDEF in the sum of RM7,374,703.32 on 10 January 2005 even before Note 2 was issued. This was paid into Pesaka's operating account which was in the control of Pesaka. There was no obligation on the part of MTB to be the sole signatory of this account.

[28] The plaintiff now contends that in respect of their first assigned contract, MTB had been negligent by failing to ensure that the correct designated account number and details were given by Pesaka to MINDEF and MTB had failed to rectify the defective notice given to MINDEF. As a result, the contract proceeds had been paid to an account controlled by Pesaka and had slipped away.

[29] These assertions by the plaintiff raise the question – what were the duties of MTB as trustee to the financing scheme? By virtue of the trust deed dated 14 July 2004 and the security trust deed dated 14 July 2004, entered into

by MTB, MTB was appointed trustee and security trustee in respect of the issuance of the commercial papers and medium term notes.

[30] The duties of a trustee in a financing scheme such as the present one were, at the material time, governed by the Securities Commission Act 1993 ('the SC Act'), which has now been replaced by the Capital Markets and Services Act 2007 ('the CMSA'). As the CMSA had only come into force on 28 September 2007, the provisions then applicable were those found under the SC Act. Part IV of the SC Act deals with issues of securities and take overs and mergers. Division 4 of Part IV of the SC Act in particular deals with 'Debentures'. Debentures under s 2 of the SC Act are defined to include bonds and notes.

[31] The duties of a borrower in a bonds or notes issue are set out extensively under ss 72–79 of the SC Act. The duties of a trustee are set out under s 82 of the SC Act. It is not disputed by the parties that the trust deed entered into between Pesaka and MTB seeks to mirror the obligations as set out in the SC Act.

[32] Now the plaintiff has brought this action against MTB for breach of contract, breach of trust and the duties under the SC Act and the Trustees Act 1949. However, the plaintiff has failed to plead the specific provisions of the allegation of infringement of the SC Act in the amended statement of claim. A claim for breach of statutory duty should specify the provision that the plaintiff claims the defendant has breached (see *Dr Abdul Hamid Abdul Rashid & Anor v Jurusan Malaysia Consultants (sued as a firm) & Ors* [1997] 3 MLJ 546).

[33] Since there is no such pleading, I agree with the submission that the plaintiff's claim against MTB must be confined to the obligations arising from the trust deed itself. That this must be the case is supported by the fact that the plaintiff appears to have abandoned the claim for breach of statutory duties as from the plaintiff's submission, only the cause of action for breach of contract and negligence against MTB is being pursued. In light of this, the plaintiff's claim ought to be considered in the context of MTB's duties as provided for in the trust deed and other relevant transaction documents.

[34] Coming now to the trust deed, the salient terms in relation to MTB's duties can be summarised as follows:

(a) *cl 2.1* provides that MTB shall hold the benefit of the trust deed and shall stand possessed of all amounts received by it from the issuer upon trust for each noteholder on the terms and conditions in the trust deed;

(b) *cl 11.1(b)(i)* provides that MTB as trustee shall exercise reasonable diligence to ascertain whether the issuer has committed any breach of the

terms, provisions or covenants of the trust deed or the Securities Commission Act 1993 and shall do everything in its power to ensure that the Issuer remedies any breach known to the trustee unless the trustee is reasonably satisfied that the breach or contravention will not materially prejudice the noteholder's interest in respect of the notes;

(c) *cl 11.1(b)(ii)* provides that where the issuer fails to remedy any breach known to the trustee, the trustee shall call for a meeting of the noteholders and place before the meeting proposals for the protection of the interest of the noteholders as the trustee considers necessary or appropriate and obtain their directions;

(d) *cl 11.3(a)* provides that MTB shall not be bound to enquire as to the occurrence or otherwise of any event of default; and

(e) *cl 11.3(b)* provides that the trustee shall not be bound to account to any noteholder for any sum or the profit element of any sum received by it for its own account whether in connection with this trust deed or otherwise.

[35] With respect to the specific allegations against MTB, it is MTB's contention that the allegation of MTB's failure to rectify the 'defective' notice of assignment is not pleaded. Relying on the Federal Court case of *Anjalai Ammal & Anor v Abdul Kareem* [1969] 1 MLJ 22, it was submitted that the court should not decide on a case not raised in the pleadings as there would be no obligation to rebut the same.

[36] In this connection I note that this point was specifically pleaded against KAF in the amended statement of claim. Now that the claim against KAF has been withdrawn it seems to me, as suggested by MTB, that the plaintiff is now trying to pitch the same argument against MTB. I am however in agreement with MTB that this allegation of defective notice and the duty of MTB to rectify it, has not pleaded. It was raised during the trial for the first time although it was pleaded against KAF. I agree that by raising this issue in this manner seriously prejudices MTB as otherwise they could and would have called witnesses to rebut the said assertions. As the plaintiff is now hinging its case against MTB on this issue, it is my finding that on this ground alone the claim against MTB must fail.

[37] In any case, I am unable to see how there could have been a fatal defect in the notice of assignment. The plaintiff claims that MTB should have used its powers as conferred to ensure that details of the proceeds account were given to MINDEF. However, no evidence was led to show that if the notice had given certain particulars, a different result would have been forthcoming. It is, I think, significant that the notice of assignment was drafted by the transaction lawyers, Messrs Abdul Talib Shahrom & Zahari. The notice of assignment of the first assigned contract mirrored the form provided in Appendix C of the

deed of assignment. Pesaka had issued the notice as advised and drafted by the transaction lawyers. There appeared to be no requirement to provide the details of the proceeds account in the said notice.

[38] In this respect, a distinction should be drawn from *Pesaka No 1* (*CIMB Bank Bhd v Maybank Trustees Bhd and other appeals* [2014] 3 MLJ 169). The Federal Court there decided that the power of attorney could have been used by MTB to ring-fence the designated accounts prior to the issuance of the bonds or alternatively, it could have been used to stop Pesaka from withdrawing monies after the issuance of the bonds because of MTB's knowledge of the following:

(a) there was evidence to show that MTB knew that the bonds were to be issued on 1 April 2004 and MTB knew that they had not become sole signatories of the designated accounts; and

(b) after the issuance of the bonds on 1 April 2004, MTB knew that the monies were credited into accounts that had not been ring-fenced.

[39] I think the position that obtains in the instant case is rather different. The proceeds of the first assigned contract were credited in the operating account. The designated accounts were already in place as required by the trust deed. The security was in place. MTB had the duty to secure the monies that were credited into the designated accounts that was in control of MTB. The monies paid by MINDEF were never in control or within the knowledge of MTB. Therefore, it was plain that MTB is not the proximate cause of the plaintiff's loss and cannot be held liable to account for the same.

[40] It is trite law that the burden is on the plaintiff to show that MTB had caused the plaintiff's loss. This has been laid out in the Federal Court decision of *Wu Siew Ying t/a Fuh Lin Bud-Grafting Centre v Gunung Tunggal Quarry & Construction Sdn Bhd & Anor* [2011] 2 MLJ 1 and the Court of Appeal decision in *Chua Seng Sam Realty Sdn Bhd v Say Chong Sdn Bhd & Ors and other appeals* [2013] 2 MLJ 29. The law is clear that liability is attributed to the effective cause of the plaintiff's loss, and not 'all possible causes'. The material contribution of the damage needs to be identified.

[41] In the instant case, it was incumbent upon the plaintiff to demonstrate that over and above the failures of KAF and Pesaka and possibly MINDEF, the effective cause of the loss was MTB. There is no evidence to suggest that MTB's failure to 'follow up' on the proceeds of the first assigned contract or MTB's purported failure to 'rectify' a notice is the main factor that caused the plaintiff's loss. For these reasons, I do not think any liability can be attributed to MTB with regard to the first assigned contract.

Second assigned contract

[42] To recap, the plaintiff's contention in relation to the second assigned contract is that MTB had been negligent in failing to follow up closely with MINDEF on the status of the second assigned contract, which then had been subsequently extended. As a consequence, the proceeds of the second assigned contract had 'similarly slipped away'.

[43] It is not disputed that the proceeds for the second assigned contract to the sum of RM3,453,000 was paid into the proceeds account by MINDEF. This amount had been secured by MTB and by an order of court dated 22 June 2011, this amount together with interest had been duly paid to the plaintiff. However, a total of RM3,757,427.85 was paid between 1 March 2007–28 February 2009 into Pesaka's account which was not one of the designated accounts under the control of MTB. This appeared to be done pursuant to an extension of the second assigned contract granted by MINDEF to Pesaka on 18 April 2007. It is noteworthy that all this transpired after the instant action was filed. So who was responsible for the monies slipping away?

[44] It is significant to recall that the event of default was called because the Issuer had defaulted on the ABBA Bonds on 30 September 2005 and not due to any breach of the CP/MTN programme. Due to the cross default clause, MTB was instructed by the plaintiff to declare an event of default. An event of default was accordingly declared on 7 November 2005 for the CP/MTN programme although the maturity date on Note 3 and Note 4 was on 9 December 2005 and 20 January 2006 respectively.

[45] In accordance with its obligations, MTB had informed MINDEF by the letter of 24 January 2006 that an event of default had occurred in the CP/MTN programme. MTB had also expressed its concern that the Issuer may not be able to repay the monies outstanding to the plaintiff Noteholder, and reiterated that all proceeds of the second assigned contract be paid directly into the proceeds account.

[46] As a result of the event of default being declared, all sums due and owing to the plaintiff noteholder had become immediately due and payable. Accordingly, MTB requested the following information from MINDEF in the same letter:

(a) if the contracts (first and second assigned contracts) have been duly performed by the issuer;

(b) the bank account in which the proceeds were paid, if any;

(c) the amounts and the specific payment dates of proceeds in relation to each of the assigned contracts; and

(d) if there are any further contract proceeds in relation to each of the contracts.

[47] On the same date, that is, 24 January 2006, MTB had also written to Bumiputra Commerce Bank Bhd to request for the statements of Pesaka's operating account, in order to ascertain and secure any monies that had been paid into that account. On 19 May 2006 and 9 June 2006, MTB had forwarded a proposed debt restructuring scheme to the plaintiff Noteholder, for its consideration on 19 May 2006, to which it did not receive any reply.

[48] It would appear that the plaintiff Noteholder was focused only on the sum of RM3m or thereabouts that MINDEF had deposited into Pesaka's proceeds account. This is evidenced by the letter from the plaintiff to MTB dated 19 July 2006, which stated as follows:

> We are given to understand that the Kementerian Pertahanan has deposited an amount of approximately RM3.0 million into the Proceeds Account bearing No. 1408-1200562-054 with Bumiputra Commerce Bank Berhad in respect of the Assigned Contract No. KP/ PERO-1/ 9201/ A/ 22/ 2303 (21)
>
> As Trustees for the Noteholder pursuant to the Trust Deed dated 14 July 2004, you are required to account to us for the same and pay over to us the proceeds of the aforesaid assigned contract towards redemption of the Notes financing facility in respect of the said contract.

[49] Now MTB contends that the plaintiff noteholder could and should have taken steps to recover the remainder amounts from MINDEF after the declaration of the event of default on 20 December 2005 and after the commencement of these proceedings on 19 July 2006. PW1, the authorised officer of the plaintiff, admitted as much in her testimony during cross-examination by counsel for MTB, Robert Lazar (RL) as follows:

> RL: Right. And you accept that Pesaka was paid by MINDEF on … we are talking about the assigned contract number 2 now. Pesaka was paid by MINDEF well after the event of default was called.
>
> PW1: Yes.
>
> RL: In fact, it would I think, be about 2 years after that.
>
> PW1: Yes.
>
> RL: In fact, Pesaka was paid this money after this legal proceeding was filed by the plaintiff.
>
> PW1: Yes.

RL: But if the trustee didn't do anything, do you accept that the plaintiff could have, could have done, could have commenced action against MINDEF, if they wanted to? On their own.

PW1: Yes.

RL: You accept that.

PW1: Yes.

[50] It was also pointed out at the trial that the noteholder could have instructed MTB to initiate proceedings against Pesaka or MINDEF on behalf of the noteholder pursuant to cl 10.2(d) of the trust deed, which states as follows:

> At any time after the Notes shall have become due and repayable, the Trustee may, at its discretion and without further notice, issue an Enforcement Notice or take such proceedings against the Issuer as it may think fit to enforce payment of the Notes and to enforce the provisions of this Deed, but it shall not be bound to take such proceedings unless:
>
> (i) It shall have been directed by an Extraordinary Resolution of the Noteholders; and
>
> (ii) Unless the Trustee has been indemnified by the Noteholders to its satisfaction against all actions, proceedings, claims, demands and liabilities to which it may thereby become liable and all cost, charges, damages, expenses (including legal expenses on a solicitor and client basis) which may be incurred by it in connection therewith.

[51] In the end, there were no such instructions from the plaintiff for MTB to take any action against the issuer or MINDEF at any point of time. This was confirmed by PW1 as follows:

RL: And your answer to question 92, you say this, your second paragraph. 'Clause 2.3 and 2.4 of the Trust Deed, Security Trust Deed, provides that MTB shall hold and stand possessed of the benefits of the contract proceeds for the Plaintiff as a security [secured] party, therefore MTB have the duty to follow up and recover the contract proceeds. Right?

PW1: Yes.

RL: That is your answer.

PW1: Yes.

RL: And you based it on clause 2.3 and 2.4. Since you had a look at the Trust Deed, Ms Yip, can I ask you to look, this is in Bundle 1B. Can you look at clause 10.2(d), page 397.You got page 397, Ms Yip?

RL: Alright. Now, first thing, Ms Yip, I want to suggest to you is this, that the duty of the trustee here, ok, in the trust deed is spelt out in this clause, to issue, take proceedings against Pesaka. Do you agree with me?

PW1: Yes.

RL: And even then it is only obliged to do so if it is directed by the Note Holder.

PW1: Yes.

RL: Yes. And in this case, the Note Holder never directed the Trustee to take action against Pesaka.

PW1: Yes.

RL: Sorry. In case I got the question wrong. In this case, the Plaintiff did not direct MTB to take action against MINDEF.

PW1: Yes.

[52] Again here I hold that the plaintiff has failed to prove that MTB had a duty to account for any proceeds deposited in any accounts other than the proceeds account. I think MTB cannot be held accountable for monies that had been deposited into Pesaka's other accounts an occurrence which was unknown to MTB.

[53] In any event, in my assessment, the proximate cause of the loss of the remainder amount which the plaintiff is now claiming has to be Pesaka who had continued to receive the monies in respect of the second Assigned contract and later siphoned it off, and also MINDEF for failing to comply with the notice of assignment of the second assigned contract, instructing for all payments to be made into the proceeds account. For all these reasons, there can be no liability against MTB for this contract and the plaintiff's claim must accordingly fail.

[54] By way of emphasis and elucidation lest it be misunderstood, in relation to both the assigned contracts, it cannot be the case that MTB should be held responsible to check on the performance of the assigned contracts, the quality of the work done by the issuer or to ensure the payments are made by MINDEF. This goes beyond the scope of a trustee in a financing scheme. The CP/MTN programme works in such a way that KAF as the lead arranger structures the private debt securities programme, the issuer performs the obligations under the future contracts and MTB ensures that the monies that come into the designated accounts, as structured in the CP/MTN programme are then disbursed in accordance with the priority of payment provided for in the issue documents.

[55] The duty of the trustee that is called in question in the present CP/MTN programme is the duty to ensure that the monies which are deposited into the proceeds account (which is one of the designated accounts) are secured for the benefit of the noteholder. This duty has been fulfilled by

MTB when it became the sole signatory of the designated accounts in July 2004, well before the issuance of any notes. For these reasons as well, this action is entirely different from *Pesaka No 1*.

CLAIM AGAINST RAFIE AND MURNIRA

[56] In this case, I think it can hardly be disputed that Rafie and Murnira were the directing will and mind of Pesaka. Rafie was the ultimate decision-maker and Murnira the largest shareholder. Together the husband and wife team owned 90% of Pesaka. There was no one else. Some other names were mentioned by Rafie in his evidence but there were mere employees who come under the ultimate control of Rafie and Murnira. It is important to note that it will be Rafie and Murnira who will be the ultimate beneficiaries of monies coming into Perkasa and not their employees. In *Pesaka No 1*, the High Court, Court of Appeal and the Federal Court all held that Rafie and Murnira were in absolute control of Pesaka and the AMDAC group at all material times.

[57] In connection with the first assigned contract, it was plain that there was an element of dishonesty and unconscionable conduct when Note 2/2005 was issued when it was known that the first assigned contract had already been performed by MINDEF and there would not be any future contract proceeds payable to Pesaka. Rafie admitted as during cross-examination that the RM7.3m ought to have been transferred to the proceeds account but that Pesaka had not done so. MINDEF would only have paid the said money into the operating account if Pesaka had allowed them to do so contrary to their obligation to the plaintiff.

[58] The plaintiff submits that the only probable conclusion is that Pesaka must have instructed MINDEF to transfer the money into the operating account instead of the proceeds account as per their agreement. I am inclined to agree. This was dishonest conduct plain and simple. The monies then disappeared and only Rafie and Murnira could have allowed this to happen as only they had the authority.

[59] As mentioned earlier, they were the controlling mind of Pesaka. Only they could have signed the relevant documents and in the end as shareholders they would have been the beneficiaries of this dishonest conduct. They knew that they had no right to the said monies. They cannot in all good conscience say that they were unaware of what was happening after signing all the important documents.

[60] In all the circumstances, Rafie and Murnira should not be allowed to hide behind the corporate veil of Pesaka. They had dishonestly used Pesaka as

a conduit to siphon off monies that did not belong to them. There was ample justification in my view to pierce the corporate veil so that liability be attributed to Rafie and Murnira.

[61] I also agree that Murnira's defense of being a mere housewife is untenable as she admitted to signing various documents in relation to the financing scheme and the accounts of Pesaka. She was content to allow herself to be used by Rafie in a scheme to misapply monies for which she was also the beneficiary. The law does not recognise her as innocent as playing blind and then pleading ignorance does not entitle her to escape liability (see *Pesaka No 1* at para 128, at p 215; *Royal Brunei Airlines v Tan* [1995] 3 All ER 97).

[62] In relation to the second assigned contract, there was an extension of the contract for another period of two years from 1 March 2007–28 February 2009. It cannot by any stretch be regarded as a new and separate contract as contended by Rafie. It was within the knowledge of Rafie and Murnira that the contract proceeds had been assigned to MTB. Instead by letter dated 24 April 2007, Pesaka directed MINDEF to pay the contract proceeds into a non-designated account. In this regard, I agree that the contract proceeds were trust monies and Pesaka had no business in dealing with those monies. Instead of ensuring that the monies were paid into the proper designated accounts as honest persons would do, Rafie and Murnira allowed the proceeds to be paid into an account controlled by Pesaka.

[63] It is safe to assert that no one else but the ones controlling Pesaka could have dealt with the monies. Such conduct was to my mind dishonest and unconscionable. I agree that in each case the conduct was such that the corporate veil of Pesaka ought to be lifted and Rafie and Murnira be made liable for the losses sustained by the plaintiff.

[64] I have not overlooked Rafie and Murnira's claim that they had not benefitted personally from the proceeds that had slipped away. However, I note that no such evidence was adduced by Rafie and Murnira. No explanation was put forward as to what happened to the monies. I think it is fair to assume that only they could have benefitted from the monies as only they had control of Pesaka. The burden fell on them to explain what happened to the monies if it was claimed that they did not benefit. They failed to do so. Instead, there was a feeble attempt to escape liability by blaming their subordinates.

CONCLUSIONS AND ORDERS

[65] In the circumstances and for the reasons stated, I find that no case has been proven against MTB by the plaintiff. Accordingly, the plaintiff's claim against MTB is dismissed. For the reasons stated, the claim by the plaintiff

against Rafie and Murnira is allowed. As a consequence of lifting the corporate veil of Pesaka, Rafie and Murnira are ordered to pay whatever sums due to discharge the indebtedness of Pesaka to the plaintiff. The claim for interest is also allowed.

[66] As for costs, plaintiff is to pay MTB costs of RM50,000. Rafie and Murnira are to pay the plaintiff costs of RM50,000. As the counterclaim by Rafie against the plaintiff was withdrawn and struck out, Rafie will also pay costs of RM15,000.

Claim against MTB dismissed but claim against Rafie and Murnira allowed and ordered to pay whatever sums were due to discharge Pesaka's indebtedness to plaintiff.

Reported by Ashok Kumar